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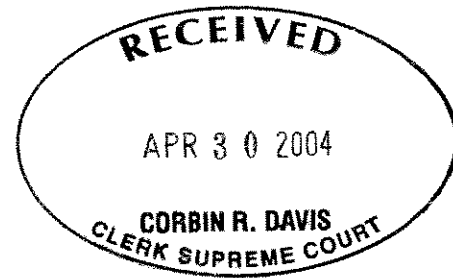
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April 30, 2004



Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Dear Mr. Davis:

The Michigan Domestic Violence Prevention and Treatment Board (MDVPTB) thanks the Michigan Supreme Court for the opportunity to comment on the proposed amendments to the Michigan Rules of Criminal Procedure. The Board's comments regarding selected proposals reflect its concern for the safety and stability of victims of domestic and sexual violence and their children, perpetrator accountability, and justice for crime victims and criminal defendants. The Board appreciates the Court's consideration of its comments.

1) MCR 6.004(C)

Would amend rules currently requiring pretrial release on personal recognizance of defendants incarcerated pre-trial for 6 months (180 days as amended in felony cases) or 28 days (misdemeanor cases). Would permit pretrial incarceration beyond these limits based upon a court finding "by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community."

MDVPTB strongly supports this proposed amendment, which promotes public safety. The 28 day pre-trial incarceration limit for misdemeanants presents particular public safety concerns and district court docketing challenges when violent offenses and dangerous offenders are involved, as often is the situation when the charge is domestic assault 2nd or 1st offense, aggravated domestic assault, or stalking. The proposed amendment will provide a much needed tool for protecting public safety, particularly for district courts handling these dangerous cases.

2) MCR 6.005(E)

Would permit courts in felony cases to refuse to adjourn a proceeding to appoint counsel or to allow a defendant to retain counsel if the adjournment would significantly prejudice the prosecution and the defendant has not been reasonably diligent in seeking counsel.



JENNIFER M. GRANHOLM, Governor

MDVPTB supports this proposed amendment, which expedites disposition of criminal cases and equips a court to avoid a common delay tactic utilized in domestic violence cases. MDVPTB suggests that to address due process concerns, the rule provide that if the court refuses to adjourn proceedings to appoint counsel or to allow defendant to retain counsel, the court must arrange for immediate appointment of counsel to represent the defendant during the proceedings which the court is refusing to adjourn, and future proceedings.

MDVPTB further suggests consideration of an equivalent provision for misdemeanor cases by way of amendment to MCR 6.610, and suggests requiring immediate appointment of counsel if the offense charged requires on conviction a minimum term in jail, or the court determines that it might sentence the defendant to jail.

3) MCR 6.005(F)

Would clarify prohibition against legal representation by the same attorney or by attorneys associated in the practice of law of two or more defendants whose cases are joined.

MDVPTB supports this proposed amendment which reduces the likelihood that an individual defendant's interests will not be adequately represented or protected due to conflict with the interests of other defendant(s) and the attorney(s) representing the other defendant(s). MDVPTB suggests consideration of a provision prohibiting representation of the defendant *and the victim* of the defendant's crime by the same attorney or by attorneys associated in the practice of law. Such dual representation unfortunately is not uncommon in domestic violence cases despite the apparent conflict of interests, and typically results in the attorney's focus on dismissal of the charges against defendant. Short- and long-term victim safety and stability typically and traditionally are not the focus of the criminal defense attorney. Victim safety interests generally conflict with the typical and traditional interests of a criminal defense attorney. Given that inherent conflict of interests, the dynamics of domestic violence which typically include inducements by the abuser to persuade the victim to "drop the charges," and the perceived authority of an attorney by a victim, a prohibition against such dual representation would reduce the likelihood that the victim's interests will not be adequately represented or protected due to the conflict with the defendant's and the defense attorney's interests. MDVPTB suggests that the Court also or alternatively consider specifically addressing this issue through the Michigan Rules of Professional Conduct.

4) MCR 6.006

Permits district and circuit courts to use two-way interactive video technology, in accordance with any SCAO requirements and guidelines, to conduct listed proceedings, a) when the defendant is at a separate location; and b) when the defendant is in the courtroom and the witness is at another location.

- a) Where defendant is at a remote location (e.g., jail), use for:

- Initial arraignment on the warrant (*QUERY: whether this could apply to arraignments after warrantless arrest for domestic assaults, probation violation, bond condition violation, PPO violation?*)
 - Arraignments on the information
 - Pretrials
 - Pleas
 - Misdemeanor sentencing
 - Show cause hearings
 - Waivers, adjournments of extradition
 - Referrals for forensic determination of competency
 - Waivers, adjournments of preliminary exams.
- b) Where defendant is in the courtroom and a witness is at a remote location, use for taking testimony in these proceedings:
- Preliminary exams
 - Evidentiary hearings
 - Sentencings
 - Probation revocation proceedings (*Note no mention of this in MCR 6.445, the probation revocation rule.*)
 - Proceedings to revoke a sentence that does not entail an adjudication of guilt, such as HYTA status.
 - Trials with consent of parties or if court determines that this would not violate defendant's right to confrontation. (*QUERY: whether this could apply to PPO violations?*)

The proposed amendments to this rule are helpful to the extent that they will improve the efficiency of court proceedings, will enhance public and courthouse safety and reduce costs by reducing the number of occasions criminal defendants are transported between detention facilities and courts, and may protect some victims from trauma caused by direct confrontation with their abusers, while protecting the defendant's right of confrontation. However, an in-person appearance by the defendant at proceedings such as arraignment, sentencing or probation revocation may also promote victim and public safety by giving the court a better opportunity to assess the defendant's demeanor. An in-person assessment may aid the court in crafting an appropriate response to any threat the defendant may pose to the victim or the public. MDVPTB also notes that assessment of credibility of witnesses is particularly critical in domestic violence cases. To address this concern, it is suggested that the proposed rule require the trial court to determine that proceeding with the witness in another location would not significantly prejudice the prosecution.

5) MCR 6.102(D)

Adds the language "where permitted by law" to the rule authorizing the court to specify on a warrant the interim bail that the accused may post to obtain release before arraignment on the warrant. MDVPTB understands that this amendment would accommodate MCL 750.582a, which prohibits release on interim bond under MCL

780.581 for specified domestic violence offenses,¹ and requires the arrested person to be held until arraigned or an interim bond is set by a judge or magistrate.

MDVPTB supports the proposed amendment, which should help clarify that MCL 750.582a requires a judge or magistrate to set bond *after* the arrest of the individual for the specified domestic assault offenses. MDVPTB suggests extending the scope of this rule to cover misdemeanor cases, because MCR 6.001 limits the scope of MCR 6.102 to felony cases, and the offenses governed by MCL 750.582a are primarily misdemeanors. The proposed language also will accommodate possible future statutory amendments that might prohibit the availability of interim bond in other dangerous crimes, such as felonious assault, assault with intent to do great bodily harm, stalking, and criminal sexual conduct.

6) MCR 6.106(D)(2)(o)

Would add to the list of conditions that a court may impose on pretrial release, the requirement that defendant “comply with any provisions limiting or prohibiting contact with any other person. If an order under this paragraph limiting or prohibiting contact with any other person is in conflict with another court order, the order under this paragraph shall take precedence over the other court order until the conflict is resolved.”

MDVPTB strongly supports this concept to promote safety for victims of domestic violence and their children, as well as other individuals whose safety is threatened by the abuser’s contact with them. It is suggested that the rule be redrafted, however, to specifically address the following issues.

- a) The authority of the court to impose provisions limiting or prohibiting contact with any person (not just the crime victim or a witness);
- b) The authority of the court to impose provisions that adversely affect the defendant’s child custody or parenting time rights; and
- c) The precedence of criminal bond orders over conflicting child custody or parenting time orders issued pursuant to state divorce or child custody laws, as it is primarily conflict with these types of orders that raises questions about the issuance and enforcement of criminal bond orders.

As written, the rule may lead to confusion by law enforcement officers or others about whether orders (e.g. a PPO and a bond order restraining the same individual) are in conflict, and whether varying provisions of the orders ought to be enforced. All provisions of different orders restraining the same individual ought to be enforced, regardless of whether the provisions are identical. If court A restrains certain behavior, and court B restrains other behavior, the individual must obey both orders, and both orders should be enforced by law enforcement officers. The orders are not in conflict. It is only when court A specifically *grants* particular rights, and court B specifically restrains or removes the rights that court A granted, that the orders are in conflict. That scenario only will occur, it appears, in the context of child custody or parenting time. If

¹ The specified offenses are: domestic assault and battery -- 1st, 2nd and 3rd offenses; and domestic aggravated assault, 1st and 2nd offenses.

that is in fact the case, the court rule should specifically address a bond order that conflicts with a child custody or parenting time order, rather than addressing conflict with "another court order," to avoid confusion about whether other types of orders are in conflict with the bond order.

Regarding issue a):

Some criminal court judges are reluctant to impose bond orders prohibiting defendant's contact with persons who are not witnesses or who are not named in the criminal complaint as victims of the defendant's crime. The proposed amendment specifically requiring the defendant to comply with any provisions limiting or prohibiting contact with any other person should help to alleviate this reluctance and result in orders that protect any person whose safety is threatened by contact with the defendant, regardless of whether the person is a witness or is named in the complaint as a victim of defendant's crime.

Regarding issue b):

In domestic violence cases, the perpetrator's access to the victim threatens the safety of that victim, and access to the victim often is attained through access to children in common with the victim. Also, in some domestic violence cases, the perpetrator's access to children in common with the victim threatens the safety of those children. In some cases the victim's safety can be protected through an order that prohibits contact with the victim, and addresses the defendant's contact with children through provisions such as requiring third parties to communicate with the defendant regarding parenting time, and requiring third parties to transport children for parenting time with the defendant. Depending on the facts of the case, however, the victim's safety and the children's safety may require that the defendant have no contact with the victim and the children.

In addition to the proposed amendment specifically requiring the defendant to comply with any provisions limiting or prohibiting contact with any other person, an amendment that specifically provides that a criminal court is authorized to impose bond conditions that adversely affect a defendant's child custody or parenting time rights, when necessary for the safety of the children, the victim, or any other person, is strongly supported by MDVPTB. It would be helpful if the amendment also provided that such bond conditions may include, but are not limited to, no contact with the minor children, supervised parenting time with the minor children, and the requirement to support the minor children. Failure to support one's minor children is criminal behavior, and bond orders typically include the requirement to comply with all criminal laws. See MCL 750.136(3)(a) and (6), MCL 750.136b(1)(c) and (d); MCL 750.167 and 168; MCL 750.165(1) and (2); MCL 750.161(1); 18 U.S.C. sec. 228(a)(1). Lack of adequate financial child support jeopardizes the safety and stability of children, as well as the adult crime victim.

Some criminal court judges (district and circuit) believe that criminal courts are not authorized to issue orders that conflict with a family court's custody or parenting time order, particularly when the children are not the named victims on a criminal complaint that charges the defendant with a crime against an adult victim. This belief and the

reluctance to issue orders that interfere with defendant's custody or parenting time rights persist despite MCR 6.106(D)(2)(e) which authorizes a criminal court to impose pretrial restrictions on personal associations. Such an amendment will help to correct this misperception and facilitate the entry of conditional release orders that better protect the safety of the adult victim, the victim's children in common with the defendant, or other persons. This approach for criminal bond orders of protection is consistent with the PPO court rule, MCR 3.706(C)(2), which permits issuance of a PPO that adversely affects a respondent's custody or parenting time rights when, without such an order, the safety of the petitioner or the minor children would be compromised.

Regarding issue c):

It is further suggested that the proposed amendment providing that a criminal bond order that limits or prohibits contact with any other person "takes precedence over any other conflicting court order until the conflict is resolved" be revised to provide that a criminal bond order takes precedence over any custody or parenting time order issued pursuant to state divorce or child custody laws until the criminal bond order expires or is terminated. This suggestion squarely addresses the issue that has created confusion, provides an approach that is consistent with current state and federal protection order laws, and gives responding law enforcement officers clear guidance regarding conflicting orders.

This suggestion recognizes the emergency, time-limited, safety-oriented, immediately responsive nature and purpose of criminal orders, in contrast with child custody and parenting time orders issued pursuant to state divorce or child custody laws. The criminal court has access to information regarding the criminal violation, information that probably did not exist when the prior custody or parenting time order was entered, and information that immediately affects the safety of the adult victim and minor children. MCR 3.205 will require the criminal court to communicate with the prior court having jurisdiction over minor children affected by the criminal court's order.

Law enforcement officers responding to the scene of a criminal bond order violation require as much certainty as possible regarding enforcement and priority of orders. Responding law enforcement officers are not likely to know when "the conflict is resolved." Presented with conflicting orders, law enforcement officers need to know which one to enforce. A rule that always gives criminal bond orders precedence over conflicting child custody or parenting time orders issued pursuant to state divorce or child custody laws provides law enforcement officers with the clear guidance they require when responding to a bond order violation. Given that a criminal bond order that prohibits contact with any other person is, in essence, a criminal order of protection, this approach also is consistent with current federal Full Faith & Credit provisions of the Violence Against Women Act, 18 U.S.C. sec 2265-2266, and Michigan law implementing that federal law, MCL 600.2950 h, j.

While it is theoretically possible that a protection order with a child custody provision could conflict with a bond order prohibiting defendant's contact with those minor children, in practice that is not likely to happen, because the criminal court will always have the opportunity to know about the prior protection order and to consult with the

prior court before issuing a bond order that conflicts with the prior protection order. In this scenario, a prior court would have issued a protection order that prohibited "A" from contact with the minor children in common with "B," and/or granted custody of the children to "B." "B" is now arrested for a criminal offense. If the criminal court is considering prohibiting "B's" contact with the minor children as a bond condition, "B" will be present in court to advise the court that a prior court has issued a protection order on behalf of "B" protecting "B" and the minor children from contact with "A," and/or granting custody of the children to "B." Given the information that the defendant and the minor children apparently are victims of "A's" violence such that a prior court prohibited "A's" contact with "B" and the minor children, and given the general reluctance of criminal courts to interfere with existing child custody or parenting time orders, it is highly unlikely that the criminal court, without consulting with the prior court and ensuring that there are arrangements for the care and custody of the minor children, would issue an order that now prohibits "B" from contact with the minor children.

It is further suggested that the proposed rule include the requirement that criminal bond orders that adversely affect a defendant's child custody or parenting time rights be issued pursuant to MCL 765.6b, so that the orders are in writing, are entered into LEIN, and will subject the defendant to warrantless arrest for violation under MCL 764.15e.

The following suggested language for the proposed rule is drawn in part from the PPO court rule that addresses child custody and parenting time rights, MCR 3.706(C).

"(o) comply with any provisions limiting or prohibiting contact with any other person.

(i) If the defendant's child custody or parenting time rights will be adversely affected by the conditional release order, the issuing court shall determine whether conditions should be specified in the order which would accommodate the defendant's rights, or whether the situation is such that the safety of the minor children or any other person would be compromised by such conditions.

(ii) Conditions which the court may impose that adversely affect defendant's child custody or parenting time rights may include, but are not limited to, no contact with the minor children, supervised parenting time with the minor children, and the requirement to support the minor children.

(iii) If the conditional release order will adversely affect the defendant's child custody or parenting time rights, the court issuing the conditional release order must contact the court having jurisdiction over the custody or parenting time matter as provided in MCR 3.205, and, where practicable, the judge should consult with that court as contemplated in MCR 3.205(C)(2) regarding the impact upon custody and parenting time rights before imposing such conditions in the conditional release order.

(iv) A conditional release order that adversely affects a defendant's child custody or parenting time rights shall be issued in compliance with MCL 765.6b.

(v) A conditional release order takes precedence over any existing child custody or parenting time order issued pursuant to state divorce or child custody laws until the conditional release order has expired or is terminated."

In addition to the foregoing suggestions, the MDVPTB suggests that the court rules governing probation orders also be amended to include these suggested provisions.

7) MCR 6.111

Would provide that if the defendant, defense attorney, and prosecutor consent on the record, a plea of guilty or nolo contendere may be taken by a district court judge in criminal cases cognizable in circuit court after bindover immediately following the conclusion or waiver of a preliminary examination.

MDVPTB strongly supports this proposal, which will improve efficiency of felony criminal proceedings. MDVPTB suggests that the rule also provide that if a plea agreement is reached in the district court regarding the felony, the prosecutor must consult with the victim before consenting to the plea agreement.

8) MCR 6.201(A)(1)

Would require a party upon request to provide to all other parties the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative a party may provide the names of the witnesses and make the witnesses available for the other party to interview.

MDVPTB supports the proposal, which promotes safety by permitting non-disclosure of addresses of witnesses when there is concern about the defendant obtaining that information. MDVPTB suggests that the rule also specifically provide that if a witness is made available for the other party to interview, and the witness agrees to be interviewed, the attorney who made the witness available may be present during the interview if the witness requests the attorney's presence.

9) MCR 6.201(E)

Would add "embarrassment" to existing possible grounds for a finding of good cause supporting a court's entry of a protective order regarding disclosure of evidence.

MDVPTB supports the proposal, which is consistent with FRCP 26(c), and provides an additional possible basis for protecting victims of domestic violence and/or sexual violence from unwarranted invasions of privacy and dignity that can occur during the course of a criminal prosecution of the assailant.

10) MCR 6.414(E)

Would give the court discretion to permit jurors to ask questions of witnesses, requiring it to employ procedures ensuring that inappropriate questions are not asked and that the parties have the opportunity to object to the questions.

MDVPTB supports the concept of jurors being permitted to submit questions to the court for the court to ask of witnesses, subject to the same protections described in the proposed rule. (i.e. The court must ensure that inappropriate questions are not asked and must provide the parties with the opportunity to object to the questions.) MDVPTB opposes permitting jurors to directly question witnesses, particularly crime victims, because there is no way to ensure that the question and manner of questioning by a juror will be appropriate. The direct questioning by jurors also exposes the crime victim to additional and unnecessary trauma, simply by requiring the crime victim to listen to, respond to and interact directly with more people (and in the case of jurors, with people who are not trained as criminal justice system professionals) who are asking intrusive questions, or who are questioning the credibility of the crime victim. The court can obtain the requested information by asking the witness the question submitted by a juror.

11) MCR 6.425(E)(1)(f)

Would require the court in sentencing a criminal defendant to order the defendant to make full restitution as required by law to the victim of the defendant's course of conduct that gives rise to the conviction or to that victim's estate.

MDVPTB supports the amendment which is consistent with MCL 780.766 in eliminating "partial" restitution, and eliminating the defendant's ability to pay as a factor to be considered in determining the amount of restitution ordered. The amendment promotes full accountability for criminal behavior, which includes the defendant's recognition of the harm caused to the crime victim, and defendant's responsibility to compensate the victim for the harm caused. The amendment also promotes victim recovery and stability by providing resources to compensate for the victim's costs and losses attributable to the defendant's criminal behavior.

12) MCR 6.445

Would provide that before accepting a guilty plea to a probation violation, the court must advise the probationer of the maximum possible sentence for the offense.

MDVPTB suggests that the rule also be amended to include procedures for a probation violation hearing following warrantless arrest for a probation violation. As written, the rule is limited to probation violation proceedings initiated by the court via summons or arrest warrant. MCL 764.15(1)(g) authorizes warrantless arrest by law enforcement officers based upon reasonable cause to believe the individual has violated one or more conditions of a probation order. MCL 771.3(2)(o) provides that probation orders with conditions for the protection of named persons shall be entered into LEIN. No provisions exist in statute or court rule, however, addressing procedures following warrantless arrest for a probation violation, which arrest may occur within or outside the jurisdiction of the court that issued the probation order. Procedures following warrantless arrest for a violation of a conditional release order are addressed in MCL 764.15e, and provide a model for procedures in the context of probation order violations.

Thank you for your attention to the foregoing comments. If you have questions or would like additional information, please do not hesitate to contact me at (517) 483-4441 or Debi Cain, MDVPTB Executive Director, at (517) 241-5114.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amy Krause".

Hon. Amy Krause

Chair, Michigan Domestic Violence Prevention and Treatment Board

CC: MDVPT Board members
Musette Michael
Debi Cain